STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 28, 2014
v	No. 312647 Wayne Circuit Court
KIRK DWAYNE COUNTRYMAN, Defendant-Appellant.	LC No. 11-008898-FC

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of three counts of assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.10, to 30 to 45 years for each of the assault with intent to murder convictions, 47 months to 7½ years for the felon-in-possession conviction and two years for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the shooting of an automobile occupied by three individuals. Witness Kawan Taylor testified that he observed a man known to him as "Black Kirk"[1] with a gun. Later that evening, he was a rear passenger in a vehicle driven by his sister, Lotoya Winston, when he saw defendant point the gun at the vehicle and start shooting. Winston sped away, but her front passenger, Arlin Johnson, was bleeding profusely from the head. As she drove away, she looked in her rear view mirror and saw defendant chasing after the vehicle while shooting. She drove to the hospital where security personnel helped Johnson inside. Johnson had brought a bookbag or backpack into the front seat of the vehicle that he later passed to Taylor. At the hospital, Taylor placed the backpack in the trunk; it contained two guns.

At trial, defendant testified in his own defense and denied any involvement in the shooting. Rather, he mowed lawns from early in the afternoon until 7:00 p.m., and then dressed for a party. He offered his sisters, Odessa Montgomery and India Countryman, who were

[1] Taylor and Lotoya Winston identified defendant by photograph as the man known as "Black Kirk," and identified defendant as the shooter at trial.

present at the home, as alibi witnesses. However, Kevin Price, the father of Montgomery's child, gave a statement to police indicating that "Black Kirk" committed the shooting. At trial, Price's denial that defendant was involved in the shooting was impeached by his prior conflicting statement. Additionally, jail conversations were admitted into evidence and submitted to the trial court. Therein, defendant expressed displeasure with Price and Johnson and apparently attempted to dissuade them from testifying. Johnson could not be located for trial and did not testify. Additionally, defendant waived the testimony of medical and ballistics experts. Despite the defense of alibi, defendant was convicted.

Defendant first argues that the prosecution committed misconduct when it presented the perjured testimony of witnesses Taylor and Winston at trial. We disagree.

An unpreserved issue of prosecutorial misconduct is reviewed for "plain error that affected . . . substantial rights." *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). This Court will only reverse if it determines that, "although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *Id*. at 454 (internal quotation omitted).

A defendant's Fourteenth Amendment due process right "is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony." *People v Gratsch*, 299 Mich App 604, 619; 831 NW2d 462 (2013) vacated in part on other grounds ___ Mich ___; 838 NW2d 686 (2013). Thus, a prosecutor has "an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility." *Id*. If a conviction has been obtained through the "knowing use of perjured testimony," then a new trial is ordered "only if the tainted evidence is material to the defendant's guilt or punishment." *Id*. at 619-620 (internal citations omitted). In short, the known perjured testimony must have a material effect on the outcome of the trial. *Id*. at 620.

There is no indication, and defendant fails to make a valid argument, that the prosecution 1) presented perjured testimony, and 2) did so knowingly. Defendant makes several assertions regarding the testimony by the prosecution's witnesses; however, these arguments are speculative or not preserved in the lower court record. First, defendant claims that Taylor perjured himself because he testified at the preliminary examination that a fourth person, "K.D.," had provided the weapons in the backpack and was in the backseat with Taylor, however, at trial, Taylor testified that he did not know who K.D. was. This inconsistency does not indicate that the prosecution knowingly presented perjured testimony. Defendant pointed out this discrepancy at trial, Taylor acknowledged his prior testimony, and also testified to taking medication that affected his memory. Defendant was also able to cross-examine Taylor regarding these inconsistencies. An objection to conflicting testimony is properly directed to the weight of the evidence, not its admissibility. *People v Hintz*, 62 Mich App 196, 203; 233 NW2d 228 (1975). "Witness credibility and the weight accorded to evidence is a question for the [trier of fact], and any conflict in the evidence must be resolved in the prosecution's favor." *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). While this testimony may be inconsistent, defendant cannot show that the prosecution knowingly presented perjured testimony. Because this argument is a challenge to Taylor's credibility, we defer to the trier of fact's determination and do not address the issue anew. See *People v Milstead*, 250 Mich App 391, 404; 648 NW2d

648 (2001) ("Nonetheless, the issue of credibility is for the jury to decide and we will not resolve credibility issues anew on appeal.")

Second, defendant argues that Taylor and Winston contradicted each other when Winston testified that she handed hospital security her car keys, and when Taylor testified that he put the backpack in the trunk of the car after they arrived at the hospital. However, this Court has held there is no authority that indicates that knowledge of false testimony is imputed to the prosecution when witnesses contradict each other. *People v Lester*, 232 Mich App 262, 278-279; 591 NW2d 267 (1998). The prosecutor need not disbelieve its own witnesses when contradicted by testimony from other witnesses. *Id*. Thus, mere contradictory statements are insufficient to show that the prosecution knew that false statements were made at trial. Again, even if Winston and Taylor offered testimony at trial that differed from their previous testimony, or seemed contradictory during trial, defendant was given an opportunity to cross-examine both witnesses and bring out those differences, and those inconsistencies were, in fact, drawn out at trial. As previously stated, defendant has failed to otherwise argue how the prosecution had knowledge of any alleged false statements.

Defendant's also claims, as his third and fourth allegations of perjury, that Taylor's and Winston's testimony that they observed defendant chasing the car down Avery Road was perjurious because it was not believable. On the contrary, the record below indicates that Taylor never testified that he observed defendant running after the car, in fact, Taylor testified that he ducked down after the first shot. Regardless, these arguments relate directly to the credibility of the witnesses, and this is not an issue for this Court to determine. *Milstead*, 250 Mich App at 404.

Fifth, defendant argues that Winston perjured herself by testifying that she only saw one person shoot at her car; however, defendant bases this argument solely on information presented in the affidavits of Kevin Price and Arlin Johnson that were appended to defendant's brief on appeal. When examining a claim of prosecutorial misconduct, this Court examines the record below. *People v Brown*, 294 Mich App 377, 382-383; 811 NW2d 531 (2011). The defendant did not present this evidence in the lower court and cannot expand the record on appeal. *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013). Because both of these affidavits were submitted after defendant's trial and sentencing, they are not part of the record and are not considered by this Court. Thus, defendant's arguments based on these affidavits are without merit.

Sixth, defendant argues that Winston's testimony that she heard six or seven shots was perjurious; however, this argument also fails. Again, defendant cannot show that the prosecution had any knowledge regarding this allegedly false statement, and further, the only evidence defendant relies on in asserting that this statement was false is a police report that was not submitted in the record below. This report cannot be considered here because of the failure to include it in the lower court record. *Id*. Thus, there is no indication that this statement was perjured, or that the prosecution knowingly presented false testimony.

Seventh, defendant argues that Winston gave contradictory testimony at trial regarding whether she was aware of the backpack of guns in her car. However, Winston consistently testified that she only found out about the guns after the shooting when police informed her

about the guns. Therefore, defendant is incorrect in arguing that this testimony was even contradictory.

Lastly, defendant attempts to argue, within his argument regarding perjured testimony, that there was a statement given to police by an eyewitness, and this shows that something occurred in the neighborhood during the incident, but does not indicate that defendant was involved. However, this argument is irrelevant because it does not have any bearing on whether the above listed testimony was perjured. Further, the police statement to which defendant refers was not in the record below, and thus, the record cannot be expanded on appeal to include this statement. *Id*. Because defendant fails, in all his arguments, to establish knowing perjured statements, he cannot show plain error. *Thomas*, 260 Mich App at 453-454.

Next, defendant asserts that his trial counsel was ineffective because counsel 1) failed to investigate the case, and failed to call Price as a witness or locate Johnson, 2) failed to call an eyewitness to testify at trial, 3) did not present evidence of Johnson's bullet wounds, 4) failed to investigate a person named "Black Kirk" on Six Mile, and 5) improperly waived firearm and crime scene expert testimony. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's "findings of fact are reviewed for clear error . . ." and questions of "constitutional law are reviewed by [the appellate court] de novo." *Id*.

Both the United States Constitution and the Michigan Constitution provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To adequately prove a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Smith v Spisak*, 558 US 139, 150; 130 S Ct 676; 175 L Ed 2d 595 (2010). Further, "[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). In evaluating an ineffective assistance of counsel claim, this Court "will not substitute its judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Finally, this Court gives defense counsel "wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case." *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

Defendant cannot show that counsel's performance fell below an objective standard of reasonableness. Defendant presents several meritless assertions in attempting to prove his ineffective assistance of counsel claim. First, defendant asserts that defense counsel failed to investigate this case. This Court has held that "the failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (internal quotations omitted). However,

defendant offers no factual proof to support this assertion. Instead, he speculates that defense counsel must not have investigated, otherwise counsel would have obtained other CDs of jailhouse conversations from the police, while failing to specify the existence of any particular CDs. Defendant again points to the Price and Johnson affidavits to support the argument that defense counsel did not investigate because he did not locate Johnson, and failed to call Price to testify. However, as previously stated, these two affidavits are not part of the record, and thus, cannot be considered by this Court. *Heft*, 299 Mich App at 80. The Court in *Carbin* held that, "[a]bsent any evidence regarding the extent of trial counsel's pretrial investigation . . .," especially regarding testimony of potential witnesses, "we conclude that defendant failed to establish a necessary factual predicate." *Carbin*, 463 Mich at 601. Similarly, based on defendant's clear lack of any insufficiency regarding pretrial investigation measures taken by trial counsel, this portion of his ineffective assistance of counsel claim fails because defendant did not establish the necessary factual predicate, and thus, he cannot show that counsel's performance was below an objective standard of reasonableness.

Second, defendant argues that defense counsel was ineffective for four related reasons: 1) he failed to call Robert Neal, an eyewitness, to testify at trial, 2) he erred in waiving firearm and crime scene experts, 3) he erred in failing to request and admit Johnson's medical records, and, 4) he failed to admit bullet evidence. However, defendant cannot show how counsel's performance here fell below an objective standard of reasonableness. This Court has held that all of the above are classified as trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). First, this Court has held that "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Russell*, 297 Mich App at 716. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013). Defendant cannot show that defense counsel's failure to call Neal as a witness deprived him of a substantial defense because defendant does not specify what additional information Neal would have offered. Similarly, defendant cannot show that defense counsel's failure to call firearm and crime scene experts to testify deprived him of a substantial defense. Defendant merely speculates why these experts should have been called as witnesses at trial – specifically that an expert could have testified regarding the number of weapons fired, the type of bullet extracted from Johnson, and the trajectory of the bullets. However, defendant offers no supporting evidence that an expert had this information and could testify to it.

Defendant also argues that counsel failed to present relevant bullet evidence and Johnson's medical records. Just as defendant must show that he was deprived of a substantial defense because counsel failed to call certain witnesses, determining what evidence to present at trial is a strategic decision, and defendant must show that he was deprived of a substantial defense by counsel's failure to present certain evidence. *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). Defendant's arguments that counsel failed to present bullet evidence from Johnson's head wound and also failed to present Johnson's medical records are without merit because, again, defendant fails to show how counsel's failure to present this evidence deprived him of a substantial defense. Defendant also had the opportunity to question several police officers regarding the admitted evidence during the course of trial. Consequently, the ineffective assistance of counsel claims fail. Moreover, we note that the expert ballistic and medical experts and information had no bearing on the alibi defense.

Finally, defendant argues that defense counsel failed to meet with Price before trial or call Price as a witness. This argument likely falls within the realm of counsel's obligation to investigate the case, and as previously stated, counsel's failure to investigate is only ineffective if "it undermines confidence in the trial's outcome." *Russell*, 297 Mich App at 716. Here, defendant simply cannot show that confidence in the trial's outcome was undermined, because defendant had the opportunity, which he took, to cross-examine Price. The information that defendant alleges would have been elicited from Price – namely, that Black Kirk was not defendant and that defendant was not present at the scene of the shooting – is information that actually came out during the prosecution's redirect examination of Price.[2] Even if defendant could somehow show that counsel's failure to talk to Price fell below an objective standard of reasonableness, defendant cannot show that he was prejudiced by this error because he had the opportunity to cross-examine Price. Thus, defendant's claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

[2] We note that it appears that trial counsel was aware of the potential damaging impact of Price's testimony on the case, and he tried to have Price excluded as a rebuttal witness by contending that Price violated the sequestration order with the prosecutor's knowledge. Moreover, the prosecutor alleged that Price attempted to avoid the subpoena. The record reflects that trial counsel did not fail to investigate Price's testimony.